

Communicating our Regulatory and Enforcement Activity Policy

1 Introduction

We aim to be an effective, open and transparent regulator.

When it's right to do so, we publicise the details of our regulatory work. This helps us achieve our strategic aims, which include:

- upholding information rights;
- promoting openness by public bodies; and
- protecting data privacy for individuals.

Publicity helps to raise confidence in – and awareness of – our work to promote good practice and deter those who may be thinking of breaching information rights legislation.

When asked about our regulatory work, we want to be as open as possible. We will withhold information only if:

- we can identify a genuine likely prejudice to our or our partners' regulatory or law enforcement activities; or
- sharing information would be unlawful.

We must be confident of the legality of – and public interest in – the information we publicise about our regulatory work and those we regulate. This policy aims to help all ICO departments act consistently when making decisions about publication and publicity.

The policy applies to publication, publicity or disclosure of information across the full range of our regulatory work, including at various stages before a final outcome is reached.

The policy talks about three types of communication:

- Disclosure – reactive communication in response to some form of request.
- Publication – proactively presenting information on our website.
- Publicity – proactive communication, typically through press releases, social media, blogs or contact with journalists.

The policy will help us operate effectively, enabling us to communicate with a focus, direction and confidence that provides maximum impact and effect. It aligns with both our [Regulatory Action Policy](#) and our [Publication Scheme](#).

2 Understanding our legal boundaries and prejudice to our regulatory work

All parts of the ICO are engaged in regulatory work of some kind.

Regulatory work includes:

- action that results in us serving an official, public notice on an organisation;
- action to empower, educate and influence those we regulate to improve their information rights practice; and
- reports or analysis about concerns and notifications submitted to us which will support our transparency agenda.

Our work will often attract interest from the public, media and other parties. We may also proactively publish details of our work and its outcomes, including information which allows citizens to protect themselves and which promotes learning among organisations.

We must always obey the statutory prohibition against sharing certain information we obtain or receive, in the course of our duties, about those we regulate.

This prohibition (s.132 of the Data Protection Act 2018 (DPA 2018)) says we must meet at least one of the following criteria otherwise we commit a criminal offence by disclosing information about those we regulate not already in the public domain:

- We have the consent of the individual or organisation to make the disclosure.
- We have been given the information to share it with the public as required by the DPA 2018 or the Freedom of Information Act 2000 (FOIA).
- The disclosure is necessary to discharge our functions under the DPA 2018, FOIA or any EU obligations.
- The disclosure is necessary as part of civil or criminal proceedings under the DPA 2018 or FOIA.
- The disclosure is necessary in the public interest.

A full copy of s.132 is available here:

<http://www.legislation.gov.uk/ukpga/2018/12/section/132/2018-05-23>

Once satisfied that we have a legal basis to publish or disclose the information, we must also be content that were we to do so, we would not prejudice our own work as a regulator or that of others we may be working alongside.

Communicating information about our work may include:

- confirming we are investigating an issue or engaging with a particular organisation to discuss their current or future information rights practice and compliance;
- updating on the progress or outcome of our most formal regulatory work, which would typically result in a notice, report or decision being issued or served on a particular organisation and published on our website; or
- updating on the progress or outcome of our more informal investigations or information rights practice discussions.

If our work to consider a particular matter or issue is not yet complete, there may be limits to how open and transparent we can be without prejudicing our regulatory work. It is also important that organisations should feel confident they can discuss certain matters with us in confidence, where this is appropriate.

When engaging with those we regulate, we should:

- take the opportunity to make them aware of our status as a public authority subject to FOIA;
- draw their attention to this policy for more information about our approach to publishing and publicising our regulatory work; and
- encourage them to highlight to us any information they provide which they consider confidential.

We will take their views into account when deciding whether publishing information about our regulatory work is in the public interest or may prejudice that work. Nevertheless, our priority is always to work to improve information rights practice and compliance among those we regulate. This will be our primary focus when deciding whether to publish information about our regulatory work.

We will take into account the following things when deciding whether publishing or publicising our regulatory work is in the public interest or likely to prejudice that work.

Factors in favour of publishing or publicising:

- It is an opportunity for education or to prevent a breach of the law.

- The issue is new or ground-breaking and therefore particularly noteworthy.
- The issue meets an ICO communications, corporate or information rights objective.
- It would help or would not prejudice an investigation.
- It is likely to deter others.
- There is a reputational risk to public confidence in the ICO if we do not publish or publicise.
- The issue or our involvement is already in the public domain. Publication would help clarify our involvement or the facts of the matter.
- It would demonstrate an improvement to information rights practice.
- There are financial market reporting obligations.
- We are working with others and it is likely that the information will be shared widely in any event.

Factors preventing or deterring publishing or publicising:

- It could prejudice a trial or other legal proceedings.
- An investigation is under way that could be hindered by publicity, or the investigation may come to nothing.
- It would include personal or highly commercially-sensitive information and it would be unfair to put it into the public domain.
- If an organisation has a legitimate expectation that its contact with the ICO would not be published or publicised, for example under exceptional circumstances where an organisation has been given an express assurance by the ICO.
- There are financial market reporting obligations.

3 Guiding principles

Principle one – on publicising or confirming our involvement

We can become involved with a regulatory matter in a range of ways. We may be alerted by a member of the public, a third party or by the organisation concerned self-reporting an incident to us. We may also begin our own research or involvement in a given issue based on analysis of intelligence gathered from a variety of sources.

Our default position is that there is generally likely to be a legitimate public interest in being open about the issues we are considering and the organisations involved. Genuine prejudice to our regulatory activity is also unlikely for most of our civil or informal work. We would not typically

provide a running commentary on our investigations or discuss our progress, but we would generally be content for it to be known that we were investigating a matter or incident with a commitment to share appropriate information about the outcome, once it is known.

We would consider not sharing this kind of information if we felt it would be likely to prejudice our consideration or investigation. We may also choose not to share this information if we believe any of the organisations or stakeholders involved have a legitimate expectation of confidentiality, either at that particular stage of the regulatory process or more generally.

Principle two – on formal regulatory outcomes

By 'formal regulatory outcomes' we mean those where we serve or issue some form of notice, reprimand, recommendation or report following our regulatory work. Our default position is that we will publish (and, where appropriate, publicise) all formal regulatory work, including significant decisions and investigations, once the outcome is reached.

Regulators, stakeholders and individuals say they want to see us taking formal regulatory action where it is warranted: it is one of the criteria by which they judge how far to have confidence in the ICO. The best way of fostering this confidence is by being as open and transparent as possible.

Principle three – on informal regulatory activity

By 'informal activity' we mean our work that does not result in serving formal notices, reports or decisions. This typically sees us discussing, educating, negotiating or influencing standards of information rights practice and compliance with those we regulate in an effort to promote good practice.

There is an important balance to be struck here. We know there is often an interest from the public in understanding our involvement with a given matter or issue. Often, it is also in our own interests to be open about our work even if it does not result in formal regulatory action. Many positive and significant improvements to information rights practice are achieved informally.

However, we also recognise that some informal engagement with our stakeholders is only possible because an appropriate degree of confidentiality is in place.

It is important that we make our decisions on a case-by-case basis when striking a proportionate balance between open and transparent regulation and stakeholder expectations.

Principle four – on informing, consulting or seeking consent

Depending on how formal our regulatory activity is, and the type of information involved, it may be appropriate for us to inform, consult or seek the consent of the organisations named in our communication before publishing it.

Stakeholders want us to have good relationships with them. We need to ensure these are based on a mutual understanding that we will use the full range of our regulatory options as appropriate.

We will not risk damaging confidence in the ICO by agreeing with an organisation that we won't publicise our formal action against it or that we will give advance warning. As an independent regulator, we need not contact the press office of an organisation we are taking formal action against before issuing a press release. Also, we need not proactively share the content of releases with organisations or tell them the likely issue date.

4 Governance and authority

While this document sets out in general terms how we intend to communicate our regulatory work, we recognise that different cases may need different approaches. If decisions on publicising information about our regulatory work are not routine, they can be escalated to the most relevant Director or Executive Director.

In some investigations, we may be working alongside other regulators. If so, we will liaise with them to discuss and agree an approach to communications. We may publicise information from other regulators' investigations as part of our communications work.

5 Practical examples of communicating our regulatory activities

The following are some examples of our typical regulatory activity and our usual approach to making them public.

Self-reported incidents and concerns reported to us

- If asked, we would typically confirm we are looking into a particular matter about a named organisation. We would provide only basic information about the concern to avoid prejudicing our consideration of it.
- We would provide a statistical summary of concerns submitted to us either in response to information requests or as part of any planned publication.

- We would publicise any trends or themes that are particularly noteworthy.

Action after incidents are reported and concerns raised

- We may publish or publicise information highlighting practice improvements in information rights after complaints and incidents are reported to us.
- This will include naming organisations if the public interest warrants it.

Whistle-blowers

- We will publish annual figures on reports made to us by whistle-blowers in line with the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017.
- The report will not contain any information that would identify individual whistle-blowers or their employers, including ex-employers.

Criminal investigations

- We will not usually publish anything about ongoing criminal investigations until these are concluded, but may confirm we are investigating.
- We would consider publishing limited information during an investigation if:
 - knowledge of it was already in the public domain, and
 - further communication would be considered likely to further our investigatory or regulatory aims.
- We will take into account our obligations under any relevant codes of practice such as the Victims Code of Practice.
- We may publicise details once we have reached an outcome or key decision point and if we regard the matter as noteworthy.

Search warrants

- We will publish details in our Annual Report to Parliament, which is also published on our website.
- We will publicise details, subject to the considerations above regarding criminal investigations.
- We are likely to publicise if the fact that we are investigating the matter is already in the public domain.
- We are likely to publicise if there is an expectation of an update or we need to show we have taken action.

- We may publicise if it helps our investigation.

Cautions

- We may publicise cautions if they are noteworthy.

Prosecutions

- We will publish these on our website.
- We will report on prosecutions in our Annual Report to Parliament.
- We may inform journalists in advance.
- We will adhere to current reporting rules.
- We may issue a news release.
- In some cases we will provide the case summary to a journalist.

Civil investigations

- Generally, we are content to confirm we are investigating or considering a particular civil matter.
- We will not provide a commentary as our work progressed unless we feel public privacy or information rights are at risk or we wish to deter similar practices to those being investigated.
- We will provide basic details of the outcome in statistical reports.
- We may provide a more detailed case study once the matter is concluded if it provides a good example of improvement to information rights practice.
- We may publicise it if we feel the issue is particularly noteworthy.

Information notices, urgent information notices, or court orders for compliance with an information notice

- We are likely to publicise if it is in the public domain.
- We are likely to publicise if there is an expectation of an update or we need to show we have taken action.
- We may publicise if it helps our investigation.

Warnings and reprimands

- We will publicise these if it will help promote good practice or deter non-compliance.

Preliminary enforcement notices and notices of intent

We will not routinely publish or publicise preliminary notices or notices of intent. However, we may do so if:

- there is an overriding public interest;
- all parties agree;

- the matter is already in the public domain;
- there are financial market reporting obligations;
- it is necessary for the purposes of international regulatory co-operation; or
- if publicising information allows for improved public protection from threat.

Any communication will make clear that the notice is preliminary and subject to a final decision after representations.

Enforcement notices and urgent enforcement notices

- We will publish these on our website.
- We will publicise these if to do so will help promote good practice or deter non-compliance.

S.159 Consumer Credit Act 1974 orders

- We may publicise these depending on noteworthiness.

Penalty notices

- We will publish these on our website.
- We will publicise the serving of a monetary penalty if doing so will help promote good practice or deter non-compliance.

Fixed penalty notices

- We will publish the names of organisations issued with a fixed penalty for not paying the data protection fee.
- We will publicise where doing so will help promote good practice and deter non-compliance

Consensual audits and advisory visits

- We will publish the names of organisations that have received an audit or advisory visit from us. We will publish an executive summary of the audit findings.
- We will publicise these events if doing so will help promote good practice or deter non-compliance.

Assessment notices, urgent and no-notice assessment notices

- We are likely to publicise if these are in the public domain.
- We are likely to publicise if there is an expectation of an update or we need to show we have taken action.
- We may publicise if it would help the assessment.

FOIA decision notices

- We will publish these on our website unless doing so would unfairly disclose personal information or prejudice related legal proceedings.
- We will publicise these depending on the public interest.
- We are likely to publicise these if there is an expectation of an update or we need to show we have taken action.

FOIA practice recommendations

- We will publicise these, depending on the public interest.

S.47 FOIA assessments

- We may publicise these depending on the public interest (and depending on whether it is subject to a confidentiality agreement or whether we have the organisation's agreement).
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- We will consult the National Archives or the Deputy Keeper of the Records for Northern Ireland (or both) if the matter relates to records management.

Liaison and practice improvement discussions

We may choose to publish or publicise details of our engagement with an organisation, or group of organisations, if there is a public interest in doing so and it would not prejudice our regulatory function.

- When deciding if there is a public interest in publishing or publicising details of our work with them, we will always consider if an organisation has a legitimate expectation of confidentiality.

Compliance and monitoring

- We will publicise the names of public bodies we are monitoring for the purposes of assessing compliance with DPA, s.10 FOIA, r.5 Environmental Information Regulations or internal reviews on a quarterly basis.
- We may also publicise the names of public bodies that have been brought to our attention as a result of other types of poor practice.

6 Likely tools for communicating regulatory activities

This is not an exclusive or exhaustive list, but gives a good indication of the ways we might choose to publicise ICO regulatory activities. The Communications team, in consultation with colleagues in relevant departments, will decide which to choose in each case:

- journalists' briefings;
- news releases;
- website and internet;
- Annual Report to Parliament;
- e-newsletter;
- blogs;
- social media, eg Twitter;
- letters;
- briefings to stakeholder groups;
- special reports to Parliament (on the decision of the Commissioner);
- thematic or 'improving practice' reports; and
- investigation updates.